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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

DOCKET NO. [redacted] 167

HUNILDA BALBAS GARDINER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To: THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Hunilda Balbas Gardiner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on February 23, 1965.

Opinions Below

The opinion of the District Court, printed in the Record at pages 65 through 69, is reported at 237 F. Supp. 692. The opinion of the Circuit Court of Appeals, printed in the Appendix, *infra*, page 12, is reported at 341 F. 2d 896.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit sought to be reviewed was entered on February 23, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Question Presented

Where petitioner in a proceeding under Section 2255 of Title 28 of the United States Code establishes that her interests were in conflict with those of her husband, a co-defendant, that the same attorney represented both, and that as a result she did not have the assistance of independent counsel, and the Government fails to allege or offer proof that she waived her right to the assistance of independent counsel, may it be presumed that she did?

Or, stated otherwise, must a petitioner in a proceeding under Section 2255 of Title 28 of the United States Code, bear the burden of proving, not only that she did not have the assistance of independent counsel, but that she did not intelligently and understandingly waive her right to the assistance of such counsel?

Constitutional Amendment and Statutes Involved

Constitution, Amendment Number VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion

pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Statement of the Case

Petitioner invoked the jurisdiction of the District Court by an application under Section 2255 of the United States Code to vacate and set aside a judgment convicting her of conspiring with her husband and others to violate the Narcotics Laws. In that application she asserted that her interests were in conflict with those of her husband, Robert Gardiner, both before and during their joint trial and that, therefore, representation of both by the same attorney deprived her of her constitutional right to the effective assistance of counsel. The Government, in its answer, denied that a conflict of interest existed between petitioner and her husband. It did not allege that petitioner waived her right to the assistance of independent counsel.

At the hearing in the District Court the Government offered no evidence that petitioner had waived her right to independent counsel. Indeed, it offered no evidence whatever, but relying solely on the record, argued that the interests of petitioner and those of her husband were not in conflict (R 32). None of the facts upon which petitioner's application is based are in controversy.

On July 10, 1962 the Grand Jury indicted petitioner's husband for conspiring with others to smuggle marijuana from Mexico into the United States (T 11-14). It did not name petitioner in that indictment. Almost two months later, on August 30, 1962, the Grand Jury indicted petitioner for participating in the same conspiracy (T 15-18).

Prior to such indictments neither petitioner nor her husband, Robert Gardiner, had ever been arrested or indicted

for any crime (R 50). Robert Gardiner, however, had been aware that he was under investigation, and prior to his indictment his mother, Shirley Gardiner, had employed counsel to assist him (R 56, 57, 62). Upon the recommendation of such counsel, Bernard Golding of the Texas Bar was then employed by Shirley Gardiner to represent him at his arraignment and defend him at his trial (R 57, 62).

In August 1962, following a conference with the United States Attorney in Houston, Robert Gardiner remained there to prepare for trial (R 40). At his request, petitioner left her home in New York with her infant daughter to join him (R 40).

The day after petitioner arrived in Houston, she was arrested and imprisoned (R 40; R 57). She was without funds to employ an attorney (R 43). Her mother-in-law, Shirley Gardiner, arranged to have Mr. Golding represent her as well as Robert Gardiner, and paid him an additional fee to do so (R 44, R 58, R 62).

Although Mr. Golding accepted the retainer, he did not then know whether petitioner's interests were in conflict with those of her husband, for upon her arraignment in response to the Court's inquiry, "I suppose there would not be any question of conflict between the interest of this defendant and her husband?", he replied, "I don't know" (T 47). Other than this colloquy, there is nothing whatever in the record from which it can be inferred that petitioner knew her interest might be in conflict with those of her husband.

In fact, there were areas of conflict between the interests of petitioner and those of her husband which made it impossible for Mr. Golding, as counsel for them both, to give petitioner the undivided loyalty and assistance to which she was constitutionally entitled. In at least four of these areas of conflict, the interests of petitioner were subordinated to those of her husband.

1. During the trial, the Government's attorney told Mr. Golding that it would permit petitioner to plead guilty to a lesser charge, a tax count (R 47, 48, 59). Mr. Golding did not relate this offer directly to petitioner. Instead he informed her husband of it, and advised him that if petitioner accepted the Government's offer he, Robert Gardiner, would be "ruined" (R 59, 60).

Robert Gardiner, in turn, repeated Mr. Golding's advice to petitioner (R 48, 59). Clearly Mr. Golding's statement to Robert Gardiner was sound. If petitioner had accepted the Government's offer, Robert Gardiner would have been prejudiced, for he would either have been deprived of his wife's testimony, or the jury would have learned that his wife had pleaded guilty to essentially the same crime with which he was charged. Mr. Golding gave no counsel whatever to petitioner.

2. Immediately following petitioner's indictment, and without considering whether in the light of such indictment it would be in her interests to testify for her husband, Mr. Golding informed the Court that she "will be obviously a vital witness in her husband's behalf" (T 54).

It was not, however, in petitioner's interests that she testify for her husband. The case against Robert Gardiner, as the District Court recognized, was "overwhelming" (R 66). The case against petitioner, as the Court also recognized, was not of the same character (T 971, 972; R 66).

Only one witness, Curtis, implicated petitioner in the conspiracy. Curtis testified that in late October, 1960 petitioner rolled marijuana with Robert Gardiner, and then acted as a lookout when the marijuana was packed (T 419, 420). Counsel, having an undivided loyalty to petitioner, would have weighed the desirability of advising petitioner to deny the Curtis testimony or to invoke her constitutional right to remain silent. On the other hand, counsel for both petitioner and her husband, in addition, had to weigh in the

scale the desirability of petitioner testifying for her husband. That Mr. Golding was influenced by Robert Gardiner's interests was shown by the fact that he did not limit petitioner's examination to a denial of the Curtis testimony, but instead elicited from her testimony concerning matters to which prosecution witnesses had testified implicating her husband, but not herself (T 581-621). Mr. Golding did not at any time advise petitioner that she need not testify, and did not at any time confer with or advise her concerning her defense (R 44).

3. The indictments against Robert Gardiner and petitioner are almost identical. They allege that between August 5, 1960 and October 29, 1960 thirteen overt acts were committed in furtherance of the conspiracy in which they participated. During this period, according to the Government, the conspirators smuggled marijuana from Mexico to the United States on three separate occasions: early in August, mid-September, and late in October.

Athens, a principal witness against Robert Gardiner, took part in each such illicit entry. On the first trip, he actually physically transported the marijuana across the border. On the second, he accompanied Collette Meyers to the border, crossed over alone, and rejoined her after she had driven across. On the third trip, Athens awaited the arrival of the marijuana at a motel in Laredo.

Athens testified concerning each of these illicit entries and the preparation therefor. His testimony on direct examination was extremely damaging to Robert Gardiner. He did not, however, implicate petitioner. On the contrary, his testimony exculpated her.

Thus, he testified that on the first trip he met Robert Gardiner in Monterey and there obtained the marijuana which he then drove across the border. He was asked

> "Q. Was Hilda Gardiner with him on that occasion?
> A. No, she was not." (T 132)

On the second trip, he went with Robert Gardiner to the latter's motel in Vera Cruz. There, with Robert Gardiner, he packed marijuana in a large shower room. He was asked what Hilda Gardiner was doing when the marijuana was being packed. He testified as follows:

> "Mrs. Gardiner was busy looking after the house and cooking food. There was a maid; they had a young girl, a Mexican girl was a maid there also.
>
> Q. All right. Now— A. But she did not see what was going on." (T 158)

Athens did not cross into Mexico on the third trip and did not testify concerning petitioner's connection, if any, with such trip.

When Athens had concluded his direct testimony, counsel for Robert Gardiner and petitioner was faced with this dilemma: petitioner's interests required that she, in effect, vouch for Athens' credibility, and that counsel cross-examine Athens only to emphasize that petitioner had nothing whatever to do with the first two illicit trips—and that Athens had no knowledge of her participating in the third. On the other hand, Robert Gardiner's interests required that Athens' character and credibility be destroyed.

Counsel resolved this conflict in Robert's favor. He launched an all out attack upon Athens' character and credibility (T 185-230). He did not, during his entire cross-examination, ask a single question which would have required an answer absolving petitioner from any association with her husband and the others alleged to have participated in the conspiracy.

4. Although Mr. Golding immediately recognized that his duty to Robert required him to have petitioner testify for him, he did not appreciate or inform petitioner of the benefit she would derive from Robert's testimony on her behalf. Robert knew that the petitioner was innocent (R 61). No one was more informed concerning her activi-

ties than he (R 61). Nevertheless, lest counsel permit Robert to expose himself to examination concerning his activities, he advised him to invoke his constitutional privilege to remain silent (R 60).

There is no dispute that Robert Gardiner's course was constitutionally justified, or that he was well advised in that course. Such course, however, served to prejudice petitioner who was thereby deprived of her most important witness.

Both petitioner and her husband were convicted of the crime with which each was charged. Petitioner was sentenced to and is serving a term of five years' imprisonment and her husband to twenty years.

Decisions of the Courts Below

Petitioner's application was argued before the Honorable Ben C. Connally on affidavits submitted by her. He considered her application "nothing more than an attempt to retry issues which were fully considered on the appeal" from her judgment of conviction (R 65), and denied it upon the ground that "there was no conflict between the interests of petitioner and her husband" (R 68). Judge Connally also held, by implication, that in any event petitioner had waived her right to the assistance of independent counsel.

The Court of Appeals rejected Judge Connally's characterization of petitioner's application as an effort to retry issues previously considered, and agreed with her that it presented "a new and substantial issue". It held, in substance, however, as it did in another case decided by it on the same day, *Nash* v. *United States*, 342 F. 2d 366, that in a § 2255 proceeding the petitioner must bear the "threshold prerequisite" of proving that she did not waive a fundamental right to which she would otherwise be en-

titled, and concluded that nothing in the record compelled "a holding that she was not adequately advised of her rights as to independent counsel and the intrinsic merits of each of the tactical-strategic trial decisions".

Reasons for Allowance of the Writ

The petition for a writ of certiorari should be granted because the Court of Appeals in holding, in substance, that a petitioner in a Section 2255 proceeding must bear the burden of proving that she did not waive her right to the assistance of independent counsel decided a federal question in a way in conflict with applicable decisions of this Court.

In both this case, and in *Nash* v. *United States*, 342 F. 2d 355, decided by the Court of Appeals on the same day, the Court dismissed petitions brought under Section 2255 upon the ground that in each such proceeding, the petitioner failed to establish the absence of a waiver. These decisions are in square conflict with the explicit mandate of this Court in *Carnley* v. *Cochran*, 369 U. S. 506. There, this Court expressly held:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel, but intelligently and understandingly rejected the offer. Anything less is not a waiver." 369 U. S. 506 at 516.

Reason supports this mandate, for, the burden of proving the negative of an infinite number of circumstances upon which a finding of waiver might be based is impossible to meet.

Consider, for example, the plight of petitioner in this proceeding. The Government, throughout the proceeding, from its answer to its brief in the Court of Appeals, has

consistently denied that a conflict existed between her interests and those of her husband. The District Court expressly held that there was no such conflict. In these circumstances, it cannot be presumed, as the Court of Appeals, in substance, has held, that petitioner waived her right to independent counsel, for to waive such right she must have known not only that which both the Government and the District Court failed to appreciate, that her interests were in conflict with those of her husband, but the legal implications flowing from such conflict. If the Government and District Court did not appreciate or understand that a conflict of interest existed between petitioner and her husband, it is manifestly unreasonable and contrary to settled constitutional doctrine to impute such appreciation and understanding to petitioner, much less an apprehension of the legal implications arising from such conflict. *Glasser* v. *United States,* 315 U. S. 60, 70.

CONCLUSION

For the reasons set forth above, this petition for writ of certiorari should be granted.

May 19, 1965.

Respectfully submitted,

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APPENDIX

Opinion.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21654

HUNILDA BALBAS GARDINER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(February 23, 1965.)

Before BROWN and BELL, Circuit Judges, and HUNTER, District Judge.

PER CURIAM: Hunilda Balbas Gardiner appeals from the denial by Judge Connally of the Southern District of Texas, after a plenary hearing under § 2255, of her motion to vacate sentence and for a new trial. At a joint trial she and her husband and others were convicted of conspiracy to violate the Narcotics Laws. The convictions of

both were affirmed by this Court, *Gardiner* v. *United States,* 5 Cir., 1963, 321 F.2d 159, cert. denied, 375 U.S. 953, as was true of the convictions of several of their co-conspirators. *Curtis v. United States,* 5 Cir., 1961, 297 F.2d 639, cert. denied, 1962, 369 U.S. 838; *Meyers v. United States,* 5 Cir., 1962, 31 F. 2d 81.

Her complaint is that she was denied effective assistance of counsel in violation of the 6th Amendment in that the same lawyer defended both her and her husband in a situation where the best interests of each defendant presented irreconcilable conflicts. As instances of such conflict, she emphasizes that putting her on the stand when her testimony could only benefit her husband and harm her, attacking a Government witness' credibility when it could only help her husband and hurt her, and the decision not to accept the offer to her of a dismissal and a plea to a lessor offense subordinated her interests to those of her husband. But nothing in this record compels a holding that she was not adequately advised of her rights both as to independent counsel and the intrinsic merits of each of these tactical-strategic trial decisions. In proceedings before the trial, the Trial Judge inquired as to any possible conflict, and none was indicated by counsel. None was thereafter made to appear on the trial.

At the § 2255 hearing, Appellant presented only her own verified pleading plus the affidavits of her husband and his mother who paid the fees of the lawyer who defended them. Although the attorney was a resident of the District and obviously had direct knowledge of these critical matters, the trial counsel was not called to testify. Judge Connally repeatedly inquired whether further testimony was desired or to be offered. On this record of partisan statements free from cross examination, the Judge had ample basis for his conclusion that Petitioner had failed to demonstrate conflicts of interest meriting another trial,

Gardiner v. United States, S.D.Texas, May 7, 1964, ... F.Supp. ....

Appellant argues that Judge Connally's misinterpretation of the nature of her complaint is revealed by his characterizing her motion as an effort to "retry" the case. While we agree with Appellant that her motion presents a new and substantial issue, this general statement made in the opening paragraph of the opinion does not detract from the validity and correctness of his analysis and disposition of this issue of conflict.

AFFIRMED.

Appendix

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1964

No. 21654

D. C. Docket No. CA-64-L-3-Civil Action

HUNILDA BALBAS GARDINER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN and BELL, Circuit Judges, and HUNTER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 23, 1965

Issued as Mandate: